

In the Matter of SOUTHWESTERN PORTLAND CEMENT COMPANY and  
INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS,  
C. I. O.

*Case No. 16-C-1119.—Decided December 28, 1945*

*Mr. Glenn L. Moller*, for the Board.

*Burges, Burges, Scott, Raspberry, & Hulse*, by *Mr. J. F. Hulse*, of El Paso, Tex., for the respondent.

*Messrs. Jess J. Nichols* and *Humberto Silex*, of El Paso, Tex., and *Mr. Willard Y. Morris*, of Washington, D. C., for the C. I. O.

*Messrs. Sewall Myer* and *Al. L. Crystal*, of Houston, Tex., *Mr. E. G. Hammer*, of Pasadena, Tex., and *Messrs. Sam Pollock, George F. Webber*, and *R. J. Textor*, of El Paso, Tex., for the A. F. L.

*Mr. Milton E. Harris*, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon a charge duly filed on August 24, 1944, by International Union of Mine, Mill & Smelter Workers, C. I. O., herein called the C. I. O., the National Labor Relations Board, herein called the Board, by its Regional Director for the Sixteenth Region (Fort Worth, Texas), issued a complaint dated November 15, 1944, against Southwestern Portland Cement Company, El Paso, Texas, herein called the respondent, alleging that the respondent had engaged and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by Notice of Hearing thereon, were duly served on the respondent, the C. I. O., and United Cement, Lime & Gypsum Workers International Union, A. F. L., herein called the A. F. L.

With respect to the unfair labor practices, the complaint alleged in substance that on or about August 15, 1944, the respondent discharged and thereafter failed and refused to reinstate Juan F. Sanchez,

for the reason that he had joined and assisted the C. I. O. and engaged in concerted activities with other employees for their mutual aid and protection.

Thereafter, the respondent duly filed its answer, in substance admitting that it discharged Sanchez on or about August 15, 1944, affirmatively alleging that it did so pursuant to a closed-shop agreement with the A. F. L., and denying that it thereby engaged in any unfair labor practice.

Pursuant to notice, a hearing was held in El Paso, Texas, on November 29 and 30, 1944, before R. N. Denham, the Trial Examiner duly designated by the Chief Trial Examiner.<sup>1</sup> At the commencement of the hearing, the A. F. L. filed with the Trial Examiner a motion for leave to intervene, asserting a vital interest in the case because of its closed-shop agreement with the respondent. The motion was granted.<sup>2</sup> The Board and the respondent were represented by counsel, and the C. I. O. and the A. F. L. by representatives.<sup>3</sup> All parties participated in the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the conclusion of the hearing a discussion of the issues was had upon the record. At the request of the Trial Examiner, counsel for the respondent, the Board, and the A. F. L. thereafter filed briefs with him. During the course of the hearing, the Trial Examiner made rulings on other motions and on objections to the admission of evidence. The Board has reviewed all the rulings of the Trial Examiner, and finds that no prejudicial error was committed. The rulings are hereby affirmed.

On February 8, 1945, the Trial Examiner issued his Intermediate Report, copies of which were duly served upon all parties. In his Intermediate Report the Trial Examiner found that the respondent had not engaged in the alleged unfair labor practices, and recommended that the complaint be dismissed. Thereafter, counsel for the Board duly filed exceptions to the Intermediate Report and a supporting brief.<sup>4</sup> No request was received from any party for oral argument before the Board in Washington, D. C., and none was held.

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<sup>1</sup> It appearing to the Trial Examiner that the instant case arose over a written agreement between the respondent and the A. F. L., he asked the parties at the opening of the hearing whether notice of the agreement had been posted, within the meaning of the limitation to the Appropriation Act then in effect. The evidence was uncontradicted that no such posting had been made. The same limitation is now in effect. Accordingly, we are satisfied that the limitation does not apply to this case.

<sup>2</sup> The A. F. L.'s representative stated at the hearing that he was intervening on behalf of Local No. 10. Because of the identity of interests of both the local and international organizations, we, like the Trial Examiner, have treated the intervention throughout as being on behalf of both organizations.

<sup>3</sup> Subsequent to the close of the hearing, appearances were entered by counsel for the A. F. L.

<sup>4</sup> Pursuant to the C. I. O.'s request, the time for filing exceptions and briefs was extended about 3 weeks beyond the original date. However, no exceptions or briefs were filed by the C. I. O.

The Board has considered the Intermediate Report, the exceptions, and the entire record in the case, and finds that the exceptions are without merit insofar as they are inconsistent with the findings, conclusions, and order hereinafter set forth.

Upon the entire record in the case, the Board makes the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENT

The respondent, a West Virginia corporation duly authorized to transact business in the State of Texas, maintains and operates a lime and cement plant at El Paso, Texas.<sup>5</sup> During the 6 months immediately preceding October 1, 1944, the respondent produced at its El Paso plant finished products, valued at more than \$500,000, approximately 60 percent of which was sold and transported to points outside the State of Texas.

The respondent stipulated at the hearing, and we find, that it is engaged in commerce within the meaning of the Act.

#### II. THE ORGANIZATIONS INVOLVED

International Union of Mine, Mill & Smelter Workers, affiliated with the Congress of Industrial Organizations, and United Cement, Lime & Gypsum Workers International Union and Local No. 10 thereof, affiliated with the American Federation of Labor, are labor organizations admitting to membership employees of the respondent at its El Paso plant.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

In February 1940 several of the respondent's employees, after conferring with an A. F. L. organizer, started a campaign to organize the employees at the El Paso plant. By the early part of April, membership applications or designations had been secured from approximately 120 of the 150 employees in the claimed appropriate unit.

Shortly thereafter, a group of the organizers approached H. S. Sparks, the plant superintendent, requested that the respondent recognize the A. F. L., and handed Sparks a copy of a proposed contract. Sparks questioned the A. F. L.'s majority, and requested a list of the employees whom the A. F. L. claimed to represent. The group refused to give Sparks such a list. Sparks then inquired whether one of the organizers would be willing to make a statement under oath, in the form of an affidavit, that the A. F. L. represented a majority of the

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<sup>5</sup> The respondent also operates plants, not involved in this case, at Osborn, Ohio, and Victorville, California

employees in the unit. The group agreed to furnish the respondent with such an affidavit, and did so shortly thereafter.<sup>6</sup> A day or two after receiving the affidavit, the respondent granted recognition to the A. F. L. as the exclusive collective bargaining representative of all the employees in the claimed unit, and entered into negotiations with the A. F. L. for a contract.

On April 17, 1940, the respondent and the A. F. L. executed a closed-shop agreement which, according to credible testimony in the record, provided in part that membership in the A. F. L. should be a condition of employment for all employees in the agreed unit.

On May 1, 1942, the respondent and Local No. 10 of the A. F. L. entered into a written agreement, received in evidence, covering all the respondent's employees at its El Paso plant with certain stated exceptions,<sup>7</sup> and containing, *inter alia*, the following closed-shop provision:

(10) EMPLOYMENT

. . . The employer [respondent] will require membership in the Union [Local No. 10 of the A. F. L.] as a condition of all present and future employment.

The term of the agreement was from the date of its execution to April 17, 1943, and from year to year thereafter in the absence of prescribed notice. According to credible testimony in the record, the agreement was automatically renewed on April 17, 1943, for the period of a year. On April 6, 1944, the respondent and Local No. 10 of the A. F. L. entered into a written amendment to the agreement, also received in evidence, providing in part that the membership requirement should continue in full force and effect for 1 year from April 17, 1944.

Juan F. Sanchez, whose discharge is herein alleged to constitute the respondent's only violation of the Act, had been employed by the respondent since 1913. He joined the A. F. L. in 1940 when the first agreement was entered into requiring membership therein as a condition of employment, and furnished the respondent with a signed A. F. L. check-off authorization. In May 1944, Sanchez became interested in organizing the C. I. O. at the plant, and soliciting designations among his fellow employees. He succeeded in getting signatures to a number of C. I. O. cards, which he turned over to Jess J. Nichols, a C. I. O. international representative.

<sup>6</sup> At the time of the hearing, neither the original nor a copy of this affidavit could be located by the respondent or the A. F. L. However, the fact that such an affidavit was made and was accepted by the respondent as satisfactory proof of the A. F. L.'s majority was established by both Sparks and employee R. J. Textor and no question was raised at the hearing as to the genuineness of the A. F. L.'s majority at that time.

<sup>7</sup> The agreement excludes those employed as superintendent, assistant superintendent, department heads, engineers and draftsmen, department foremen, chemists, purchasing agent, personnel officer, timekeeper and assistants, and such others as both parties may agree upon.

Several weeks prior to August 15, 1944, the A. F. L. discovered Sanchez's activity on behalf of the C. I. O., conducted an inquiry concerning it, and then notified E. G. Hammer, the A. F. L.'s fourth general or international vice president. Hammer thereupon went to El Paso, conducted some investigations on his own account, and satisfied himself that Sanchez was in fact engaged in the solicitation of memberships for the C. I. O. On at least two occasions during this period, officials of the A. F. L. requested Sanchez to surrender such C. I. O. cards as he had and to give up his solicitation for the C. I. O. Sanchez ignored the requests.

In the course of some grievance discussions between the respondent and the A. F. L. grievance committee at various times prior to August 15, 1944, mention was made to Superintendent Sparks by members of the committee that Sanchez was soliciting memberships in another labor organization and was being investigated for it. While Hammer, the A. F. L.'s international vice president, was in El Paso, he advised Sparks that he was personally investigating Sanchez's activities in soliciting memberships in another labor organization.

On August 15, 1944, Hammer wrote and delivered to Joseph B. Sterling, the financial secretary of Local No. 10 of the A. F. L., a letter on official stationery, reading in part as follows:

In Re: CIO activities in Local Union #10.

By the authority vested in me under Article 19, Section 3 of the International constitution and by the official letter of President Schoenberg dated July 31, 1944, I hereby am expelling from immediate membership Juan F. Sanchez . . . for attempting to inaugurate a dual movement and the destruction of Local #10, and desire that you advise . . . the Southwestern Portland Cement Company . . . that they are to invoke immediately Article 10 of the existing contract. . . .<sup>8</sup>

A copy of this letter was sent to the respondent. Sterling, upon receipt of Hammer's letter, immediately wrote and personally delivered to Superintendent Sparks a letter on official stationery, advising the respondent that in accordance with Hammer's attached letter Sanchez was no longer a member of Local No. 10 of the A. F. L., and requesting his discharge at once.

Upon receipt of Sterling's letter, Sparks had Sanchez's time card removed from the rack. When Sanchez reported for work and found his time card missing, he made appropriate inquiry and was referred to Sparks. Sparks told Sanchez that in view of the respondent's agree-

<sup>8</sup> Article 10 of the existing contract, as set forth above, provided that membership in Local No. 10 of the A. F. L. was a condition of employment

ment the employees had to remain in good standing with Local No. 10 of the A. F. L. as a condition of employment, that that organization had sent the respondent a letter stating that Sanchez had been expelled from membership and requesting his discharge, and that it was therefore necessary for the respondent to discharge Sanchez. Although Sanchez was still in financial good standing in Local No. 10 of the A. F. L. pursuant to the unrevoked check-off authorization which he had furnished the respondent, he was thereupon discharged and paid off. Sanchez was not thereafter reinstated by the respondent.

### Concluding findings

In view of the foregoing facts, we are of the opinion that the respondent's discharge of Sanchez did not violate the Act. In April 1944 the respondent, in accordance with the proviso to Section 8 (3) of the Act,<sup>9</sup> made an agreement with Local No. 10 of the A. F. L. requiring membership in that organization as a condition of employment for the ensuing year.<sup>10</sup> We find, as did the Trial Examiner, that the unit covered by the agreement was appropriate for the purposes of collective bargaining at the time it was made, and that the A. F. L. was the representative of the employees in such unit at that time and was not established, maintained, or assisted by any unfair labor practice of the respondent.<sup>11</sup> Accordingly, we find that the respondent did not violate the Act by imposing on its employees the requirement of membership in Local No. 10 of the A. F. L. as a condition of employment for the period of time covered by the agreement here involved.

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<sup>9</sup> Section 8 (3) provides in part that it shall be an unfair labor practice for an employer by discrimination in regard to tenure of employment to encourage or discourage membership in any labor organization, and continues with the following proviso :

Provided, That nothing in this Act \* \* \* shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

<sup>10</sup> Counsel for the Board argued that a provision in the agreement, permitting the respondent to terminate the agreement "in the event a majority of employees sever their affiliations" with the A F L, in effect annulled the membership requirement with respect to any employee who might be expelled from membership for promoting a rival union at any time during the term of the agreement, on the ground that the agreement "obviously must have contemplated possible agitation for such a change" Like the Trial Examiner, we reject this argument, because the record is devoid of any evidence of loss of majority by the A F L., the sole ground upon which the respondent was authorized to terminate the membership requirement

<sup>11</sup> No exception was filed to the Trial Examiner's finding that the agreement was validly made within the meaning of the proviso. Counsel for the Board had argued at the hearing before the Trial Examiner that the 1940 agreement was not validly made, because of the respondent's ready acceptance of the A F L.'s majority claim. Like the Trial Examiner, we reject this argument because the evidence is uncontradicted that the A. F. L. did in fact represent a majority at that time

Despite this lawful agreement, counsel for the Board argued before the Trial Examiner and has filed a brief in support of his exceptions, contending that Sanchez's discharge is discriminatory under the doctrine both of the *Rutland Court* case<sup>12</sup> and the *Wallace Corporation* case.<sup>13</sup>

While there is a superficial resemblance between the facts developed in this record and those considered in our *Rutland Court* decision, we do not feel that the rule enunciated there is applicable to the case at bar. The situation in the *Rutland* decision was as follows: *Shortly before* the expiration of a closed-shop agreement with one union, a number of the employees, being dissatisfied with what their bargaining agent had accomplished for them, had decided to secure another union to represent them for negotiating a new agreement for the next term. These dissatisfied employees gave authorization cards to a rival union which thereupon notified their employer that, representing a majority of the employees in the unit, it desired recognition as bargaining agent. The business agent of the contracting union, being apprised of this, prevailed upon the employer to help him learn the identity of the dissident employees, announced that they were no longer in good standing, and demanded their discharge. This demand was granted, the places of these employees were filled by the contracting union, and the employer thereafter negotiated another closed-shop agreement with that organization.

In determining that these discharges were discriminatory, we held that what these employees had done was to exercise the right of selecting a representative choice guaranteed by the Act, and that they had not waived this right by joining a union which negotiated a closed-shop agreement, since all they had done was to bind themselves to remain in that union during the term of the contract. We did not go so far as to hold, however, that the proviso in Section 8 (3) should be so narrowly construed as to render the application of a closed-shop agreement inoperative as to all union expulsions for "dual-unionism," although some commentators have indicated that the *Rutland* decision stood for that broad proposition.

Here, as in the *Rutland Court* case, the respondent knew that the employee whose discharge has been drawn into the question had been expelled from membership in the contracting union for his activity in behalf of a rival organization. But the facts of this case suggest that the aggrieved employee was not merely attempting to bring about a change in the bargaining representative to take effect at the end of the contract term. It is significant that his activities in behalf of

<sup>12</sup> *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587; 46 N. L. R. B. 1040.

<sup>13</sup> *Matter of Wallace Corporation*, 50 N. L. R. B. 138, enf'd 141 F. (2d) 87 (C. C. A. 4), aff'd 323 U. S. 248.

the C. I. O. occurred shortly after a valid agreement requiring membership in the A. F. L. as a condition of employment was signed. At the time of his discharge, the agreement still had more than 8 months to run. Moreover, the record fails to establish that in soliciting other employees to go over to the rival organization, Sanchez indicated that this step was not to be taken for several months. Consequently if his campaign had been successful, it might well have undermined the status of the existing bargaining representative in the middle of the contract term.

In the interest of effectuating the policies of the Act by encouraging collective bargaining and stabilizing labor relations, we find that such circumstances establish a sharp distinction between this case and the *Rutland Court* holding, for here the union activity which the respondent knew motivated the expulsion was not primarily designed to secure for the employees an opportunity at an appropriate time to exercise their right to "change their collective bargaining representative for the next contractual period" and to "affiliate with and campaign for any union for the next period."<sup>14</sup>

In his partial reliance on the *Wallace* case, counsel for the Board cited a decision which bears even less closely upon the central issues here. That decision, which was upheld by the Supreme Court of the United States, dealt with the issue of non-admission to a union, rather than expulsion. It was simply a reaffirmation of the old principle illustrated in the *Henri Wines* case<sup>15</sup> that the illegality of a discharge based on the fact that a particular employee is obnoxious to the majority union cannot be erased by the execution of a closed-shop agreement, if prior to such agreement the signatory company knows that this employee will be refused membership in the contracting union. While we do not agree with the narrow construction placed upon the *Wallace* decision by the Trial Examiner (he erroneously assumed that the Supreme Court holding was limited to organizations which did not meet the test of the proviso in Section 8 (3)—i. e., organizations which were dominated or assisted by the employer's unfair labor practices), his conclusion that the case was not in point was well taken.

We therefore find that the respondent did not violate the Act by discharging Sanchez because of his expulsion from membership in Local No. 10 of the A. F. of L., in view of the lawfully agreed requirement of membership in that organization as a condition of employment. Accordingly, we shall dismiss the complaint herein.

Upon the basis of the foregoing findings of fact and the entire record in the case, the Board makes the following:

<sup>14</sup> *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, 594, 596.

<sup>15</sup> *Matter of Monsieur Henri Wines, Ltd.*, 44 N. L. R. B. 1310.

## CONCLUSIONS OF LAW

1. International Union of Mine, Mill & Smelter Workers, C. I. O., United Cement, Lime & Gypsum Workers International Union, A. F. L., and local No. 10 thereof are labor organizations within the meaning of Section 2 (5) of the Act.

2. The respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

3. The respondent has not engaged in any unfair labor practices, within the meaning of Section 8 (1) and (3) of the Act.

## ORDER

Upon the basis of the foregoing findings of fact and the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the complaint against the respondent, Southwestern Portland Cement Company, El Paso, Texas, be, and it hereby is, dismissed.